UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. CARL THOMPSON, *Defendant-Appellant.*	No. 73-1847
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. STEVEN TERESI, JR., *Defendant-Appellant.*	No. 73-1018

[March 12, 1974]

Appeal from the United States District Court
for the Central District of California

Before: ELY and TRASK, Circuit Judges, and
JAMESON,* District Judge

TRASK, Circuit Judge:

Following a jury trial, appellants Teresi and Thompson were convicted of violating 21 U.S.C. § 176(a), which made unlawful conspiring to import marijuana into the United States.[1] After examining each allegations of error asserted by appellants, we find

*Honorable William J. Jameson, Senior United States District Judge, for the District of Montana, sitting by designation.

[1]The statute was repealed in 1970. Act of Oct. 27, 1970, Pub. L. No. 91-513, tit. III, pt. B, § 1101(a)(2), 84 Stat. 1291.

that the proceedings below were free from any prejudicial error and affirm both convictions.[2]

Appellants were indicted with three other individuals on July 14, 1971, for conspiring to smuggle marijuana during the years 1969-1971. As demonstrated at the trial, however, the actual duration of the conspiracy extended from November 1969 to February 1970.

Prior to the trial, one defendant, Moore, pleaded guilty and became a Government witness. In addition to Moore, several coconspirators who had not been indicted testified that in 1969 Thompson had instructed them to engage boats which could be employed in smuggling marijuana; that in January 1970, Thompson, Moore, and Teresi went to Mexico to supervise the shipment of marijuana; and that, although the marijuana was subsequently transferred to another boat, the shipment was eventually delivered to Long Beach, California, where, on or about February 11, 1970, it was distributed by Thompson, Teresi, and Moore. In 1971, appellants were arrested and charged with conspiracy to smuggle marijuana. The marijuana in question was never seized by the Government and, accordingly, no marijuana was introduced as evidence at appellants' trial.

On appeal, both Thompson and Teresi contend that it was erroneous not to dismiss the indictment since, allegedly, portions of the grand jury proceedings were not recorded. In addition, Teresi challenges the adequacy of discovery accorded him in this case, the District Court's denial of his motion for a new trial without an evidentiary hearing, and the propriety of the instructions given to the jury.

Selective Recordation of Grand Jury Proceedings

Prior to the commencement of grand jury proceedings, appellant Thompson, through counsel, wrote to the United States Attorney and requested that all such proceedings be recorded.

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[2]At oral argument, counsel for appellant Teresi asserted his belief based upon unofficial information that Teresi is now deceased. Counsel was given 10 days within which to verify this belief. No such verification has been submitted to the court, and we decline to assume the existence of Teresi's death as fact.

Relying upon *United States v. Thoresen*, 428 F.2d 654, 665-66 (9th Cir. 1970), both appellants argue that any failure to comply with this request "should not be tolerated" by this court. Appellants allege that there was selective recordations; specifically, that there was testimony by federal investigative agents which was not recorded. This is wholly speculative; indeed, the Government answers that the "testimony of every witness who appeared before the Grand Jury in this case was recorded."[3] Even if one assumes the presence of selective recordation, however, the appellants have failed to demonstrate the "clear indication" of prejudice that *Thoresen* requires before an indictment may be dismissed for failure to record grand jury proceedings. *Thoresen*, *supra* at 666; *accord*, *United States v. Price*, 474 F.2d 1223, 1226 (9th Cir. 1973). Appellants speculate that a Government agent testified before the grand jury. Even if this were true, no such agent testified at the appellants' trial. In this regard, it is instructive to contrast this case with *Lenske v. United States*, 383 F.2d 20 (9th Cir. 1967), in which selective recordation, similar to that alleged here, was severely criticized. 383 F.2d at 24-25 (dictum). The prejudice in *Lenske* was clear: The agent who had testified at the grand jury proceedings did, in fact, later testify at the defendant's trial; the lack of recorded grand jury testimony precluded effective cross-examination. *Id.* In the present case defendants' counsel acknowledged at oral argument that copies of the transcripts of all trial witnesses who had testified before the grand jury were submitted to the trial court and to defense counsel a day or so before trial. They were therefore available to the defense for examination while the witnesses were available for cross-examination. *Dennis v. United States*, 384 U.S. 855, 875 (1966).

Appellants also seek to establish prejudice attributable to alleged nonrecordation by conjecturing that the grand jury was presented hearsay testimony prior to the return of its indictment. It is true that in *United States v. Arcuri*, 405 F.2d 691 (2d Cir.

[3]Brief of Appellee, United States v. Thompson, at 6; Brief of Appellee, United States v. Teresi, at 7, making reference to pages of the reporter's transcript of the trial where defendants' counsel referred to grand jury testimony in cross-examination.

1968), *cert. denied*, 395 U.S. 913 (1969), and *United States v. Gramolini*, 301 F. Supp. 39 (D.R.I. 1969), the deliberate use of hearsay before the grand jury, when direct testimony was available, was criticized and recognized as a possible basis for dismissal of the indictment. 405 F.2d at 693-94; 301 F. Supp. at 42-43. In this case, however, there has been no showing that hearsay testimony was so used; indeed, the Government notes that several participants in the conspiracy testified before the grand jury. Nonetheless, this circuit has not yet so limited *Costello v. United States*, 350 U.S. 359 (1956), wherein an indictment issued by a grand jury before which only hearsay testimony was elicited was held sufficient. *See United States v. Fox*, 425 F.2d 996, 1001 (9th Cir. 1970). Thus, even if hearsay testimony was presented before this grand jury, in order for an indictment procured partially by incompetent evidence to be dismissed on appeal, *Fox* requires a showing that the trial court abused its discretion in failing to do so. *Id.* Given the presence here of substantial direct evidence before the grand jury, such a showing has not been made.

Appellants further contend that partial nonrecordation in this case resulted in prejudice since, at their trial, they were "confronted with testimony from witnesses who did not testify before the grand jury." On the contrary, there is no requirement that all witnesses who testify at a trial must previously testify before the grand jury which indicts the defendant. *United States v. Nasse*, 432 F.2d 1293, 1305 (7th Cir. 1970), *cert. denied*, 401 U.S. 938 (1971).

Adequacy of Discovery

Since there had been no seizure of marijuana in this case, there were no scientific tests on the substance that could be discovered by appellant Teresi. Furthermore, as will be discussed *infra*, the presence of marijuana was not material to this prosecution for *conspiracy* to smuggle marijuana. Hence, Teresi's request to discover the results of any tests made on the substance did not satisfy the "relevancy" requirement of Fed. R. Crim. P. 16(a) or the "materiality" requirement of Fed. R. Crim. P. 16(b).

The denial of appellants' pretrial motion for disclosure of grand jury testimony was proper since there was no demonstra-

tion of any "particularized need" to examine the testimony at that time.[4] *Dennis v. United States*, 384 U.S. 855, 872-73 (1966); *United States v. Parker*, 469 F.2d 884, 888-89 (10th Cir. 1972); *United States v. Cole*, 449 F.2d 194, 198 (8th Cir. 1971), *cert. denied*, 405 U.S. 931 (1972). Counsel for appellants were provided copies of relevant testimony before the grand jury during the course of the trial and in time to facilitate effective cross-examination. Absent any express need for earlier disclosure, this was all that was necessary. *Dennis, supra* at 875.

The District Court's denial of Teresi's motion for a witness list was not erroneous; in a noncapital case such as this, there is no entitlement to such a list prior to trial. *United States v. Glass*, 421 F.2d 832, 833 (9th Cir. 1969). Appellant Teresi further objects to the "concealment" of certain Government witnesses during pretrial proceedings. The seclusion of such witnesses, however, was consistent with the lack of any requirement to disclose the identities of Government witnesses prior to trial. *United States v. Glass, supra*. Such a procedure is also properly authorized by Fed. R. Crim P. 16(d), (e).

Teresi alleges that it was erroneous to deny him the opportunity, upon cross-examination of "the government witnesses," to discover the current addresses of these witnesses. The appellee answers that such an objection was made during the trial, but was made with regard to only one witness. Indeed, this is consistent with the relevant motion filed by Teresi below. C.T. at 155. The appellee further represents that this information was provided to the appellant.[5] Assuming that the information was not so provided, however, the foreclosure of this inquiry on cross-examination, although erroneous, *Smith v. Illinois*, 390 U.S. 129 (1968), was harmless. In *Smith*, the "only real question at the trial" was the relative credibility of the defendant and the prosecution witness whose address was not disclosed. *Smith, supra* at

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[4]In appellants' Motion for Pretrial Discovery, counsel merely stated that he "seeks these transcripts and records in order to prepare, among other things, for the trial as well as the motion to dismiss." C.T. at 44. This contrasts sharply with the "particularized need" evident in *Dennis*. *Dennis, supra* at 872-73.

[5]Brief of Appellee, United States v. Teresi, at 11.

130. Here, in addition to the witness whose address was sought, eight accomplices testified as Government witnesses at Teresi's trial.

Denial of Teresi's Motion for a New Trial

The decision whether or not to conduct an evidentiary hearing to consider a motion for a new trial is a matter of discretion. *United States v. Clay*, 476 F.2d 1211, 1216 (9th Cir. 1973). Moreover, for a new trial motion to be granted, the movant must show that the newly discovered evidence is not merely cumulative and would "probably produce an acquittal." *Id.* at 1215. Teresi's "newly discovered evidence" was a possibility that two witnesses, in exchange for their testimony, had been promised a dismissal of criminal charges against them. The testimony of these two witnesses was not significant as to appellant Teresi.[6] Given the presence of other testimony sufficiently establishing the existence of the conspiracy, and Teresi's participation in it, one cannot say that the use of the "newly discovered evidence" to attempt to impeach the credibility of these witnesses would, even if the impeachment were successful, "probably produce an acquittal." Appellant's motion for a new trial was properly denied. *Cf. Remmer v. United States*, 347 227 (1954).

Teresi's Jury Instructions

Appellant requested a jury instruction to the effect that, if the jury should find his codefendant Thompson not guilty by reason of insanity,[7] then Teresi could not be considered a member of the conspiracy until it was shown that Teresi had conspired with one who was mentally competent. Since Thompson was found guilty, the refusal to give this instruction, even if assumed to be erroneous, was harmless. *Kotteakos v. United States*, 328 U.S. 750,

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[6]*See* R.T. at 2029-30. The witnesses, Nicholas and Edward Saenz, testified primarily about several meetings that they had attended with Thompson and other unindicted coconspirators in which plans to smuggle marijuana were discussed.

[7]Thompson's defense below was that, at the time these smuggling activities occurred, he was legally incompetent because of extensive drug usage.

764-65 (1946); *Sang Soon Sur v. United States*, 167 F.2d 431, 433 (9th Cir. 1948).

Teresi also appeals the denial of his requested instruction that the object smuggled as a result of this conspiracy must have been proved to have been marijuana. Appellant contends that, since this is a specific intent charge to violate the federal narcotics law, "there could be no conspiracy to violate the marijuana laws" unless the substance in question was in fact marijuana. Yet the crime of conspiracy is complete upon the agreement to violate the law, as implemented by one or more overt acts (however innocent such may be), and is not at all dependent upon the ultimate success or failure of the planned scheme. *United States v. Rabinowich*, 238 U.S. 78, 86-88 (1915); *Toliver v. United States*, 224 F.2d 742, 744 (9th Cir. 1955). Thus, whether or not the substance involved was marijuana is irrelevant. Accordingly, although the jury received inconsistent instructions concerning the necessity for proof of actual marijuana,[8] this was harmless error. *Ryan v. United States*, 278 F.2d 836, 839 (9th Cir. 1960).

Teresi further contends that he was entitled to a jury instruction which would indicate that 18 U.S.C. § 371 (the general conspiracy statute) was a lesser included offense of 21 U.S.C. § 176(a) (conspiracy to smuggle marijuana). Since both these statutes might be applied to the same criminal conduct, the particular statute (21 U.S.C. § 176(a)) renders the other, general statute irrelevant. *Conerly v. United States*, 350 F.2d 679, 681-82 (9th Cir. 1965), *cert. denied*, 382 U.S. 1018 (1966); *Enzor v. United States*, 262 F.2d 172, 174 (5th Cir. 1958), *cert. denied*, 359 U.S. 953 (1959).

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[8]At one juncture the court charged the jury:

> "[P]roof that marijuana was in fact obtained or imported is not required, it being sufficient if the plaintiff prove beyond a reasonable doubt that defendants knowingly and intentionally conspired to do any of the acts forbidden by the statute." R.T. at 2083.

Subsequently, however, the court stated:

> "In the indictment it is alleged that a particular amount or quantity of marijuana was involved. The evidence in the case need not establish that the amount or quantity of marijuana was as alleged in the indictment, but only that some measurable amount of marijuana was in fact the subject of the acts charged in the indictment." R.T. at 2091.

Appellant's final argument relates to the denial of his requested entrapment instruction. Since Teresi did not admit the acts constituting the crime charged, however, the defense of entrapment was not available to him. *United States v. Hendricks*, 456 F.2d 167, 169 (9th Cir. 1972).

The convictions of both appellants are affirmed.

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APPENDIX B

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UNITED STATES COURT OF APPEALS

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)

Plaintiff-Appellee,)

vs.) No. 73-1847

CARL THOMPSON,) O R D E R

Defendant-Appellant.)

Before: ELY and TRASK, Circuit Judges, and JAMESON,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

*Honorable William J. Jameson, Senior United States District Judge, for the District of Montana, sitting by designation.

MEMORANDUM

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1769

CARL THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-6622

STEVEN TERESI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners contend that the indictment should have been dismissed because portions of the grand jury proceedings were not recorded. Petitioner Teresi contends that he was denied adequate discovery; that he was erroneously denied a new trial without an evidentiary hearing; and that the court erred in failing to give requested jury instructions.

After a jury trial petitioners and three co-defendants were convicted of conspiring to import tons of marijuana into the United States, in violation of 21 U.S.C. (1964 ed.) 176a. Petitioners were sentenced to

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terms of five years' imprisonment. The court of appeals affirmed (Pet. App. A; 493 F. 2d 305).[1]

During the trial, several unindicted co-conspirators and one Alexander Moore, a defendant who had previously pleaded guilty, testified for the government. Their testimony showed that in late 1969 petitioner Thompson had instructed them to engage boats for use in smuggling marijuana. In January 1970, Thompson, petitioner Teresi, and Moore went to Mexico to supervise the smuggling operation. The shipment of marijuana arrived by sea in Long Beach, California, where petitioners and Moore distributed it on February 11, 1970. The marijuana in question was never seized by the government.

1. Petitioners contend that the grand jury proceedings were selectively recorded, in violation of *United States* v. *Thoreson*, 428 F. 2d 654, 665 (C.A. 9). But as indicated by the court of appeals (Pet. App. A, p. 3; 493 F. 2d at 308):

> * * * [T]he Government answers that the "testimony of every witness who appeared before the Grand Jury in this case was recorded." Even if one assumes the presence of selective recordation, however, the [petitioners] have failed to demonstrate the "clear indication" of prejudice that *Thoresen* requires before an indictment may be dismissed for failure to record grand jury proceedings. *Thoresen, supra,* [478

[1] The court of appeals affirmed on March 12, 1974. A petition for rehearing in No. 73-1769 was denied on April 24, 1974. The petitions in Nos. 73-1769 and 73-6622 were filed on May 25, 1974, and April 25, 1974, respectively, and are out of time under Rule 22(2) of the Rules of this Court. "Pet. App. A" refers to Appendix A of the petition in No. 73-1769.

> F. 2d] at 666; *accord, United States* v. *Price,* 474 F. 2d 1223, 1226 (9th Cir. 1973). [Petitioners] speculate that a Government agent testified before the grand jury. Even if this were true, no such agent testified at [their] trial. * * * [D]efendants' counsel acknowledged at oral argument that copies of the transcripts of all trial witnesses who had testified before the grand jury were submitted to the trial court and to defense counsel a day or so before trial. They were therefore available to the defense for examination while the witnesses were available for cross-examination. *Dennis* v. *United States,* 384 U.S. 855, 875 (1966). [Footnote omitted.]

Petitioners also seek to establish prejudice attributable to alleged nonrecordation by conjecturing that the grand jury was presented hearsay testimony prior to the return of its indictment. *Costello* v. *United States,* 350 U.S. 359, however, established that an indictment issued by a grand jury before which only hearsay testimony was elicited may be sufficient. There is no showing in the instant case that the trial court abused its discretion in failing to dismiss the indictment. See *United States* v. *Fox,* 425 F. 2d 996, 1001 (C.A. 9).

Moreover, petitioner Thompson's suggestion that the recorded grand jury testimony of government trial witnesses which the prosecution turned over to the defense was given before a grand jury other than the one which indicted petitioners is merely speculative, as is his assertion that the grand jury heard only the

hearsay testimony of a government agent. Seven of petitioners' accomplices appeared before the grand jury which returned the indictment and all their testimoney was recorded. Petitioners were furnished with the grand jury testimony of all government trial witnesses.

2. Petitioner Teresi's contentions concerning the adequacy of discovery are unwarranted. Teresi's request to discover the results of any tests made on the marijuana did not satisfy the "relevancy" requirement of Fed. R. Crim. P. 16(a) or the "materiality" requirement of Fed. R. Crim. P. 16(b), since there was no seizure of marijuana in this case and the presence of marijuana was not material to this prosecution for *conspiracy* to smuggle marijuana.

The denial of Teresi's pretrial motion for disclosure of grand jury testimony was proper since there was no demonstration of any "particularized need" to examine the testimony at that time.[2] *Dennis* v. *United States,* 384 U.S. 855, 872–873; *United States* v. *Parker,* 469 F. 2d 884, 888–889 (C.A. 10); *United States* v. *Cole,* 449 F. 2d 194, 198 (C.A. 8), certiorari denied, 405 U.S. 931. Counsel for petitioners were provided copies of relevant testimony before the grand jury during the course of the trial and in time to facilitate effective cross-examination. Absent any express need for earlier disclosure, this was all that was necessary. *Dennis, supra,* 384 U.S. at 875.

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[2] In petitioners' Motion for Pretrial Discovery, counsel merely stated that he "seeks these transcripts and records in order to prepare, among other things, for the trial as well as the motion to dismiss." C.T. at 44. This contrasts sharply with the "particularized need" evident in *Dennis, supra,* 384 U.S. at 872–873.

The court's denial of Teresi's motion for a witness list was not erroneous; in a noncapital case such as this, there is no entitlement to such a list prior to trial. *United States* v. *Glass,* 421 F. 2d 832, 833 (C.A. 9). Teresi further objects to the "concealment" of certain government witnesses during pretrial proceedings. The seclusion of such witnesses, however, was consistent with the lack of any requirement to disclose the identities of government witnesses prior to trial. *United States* v. *Glass, supra.* Such a procedure is also properly authorized by Fed. R. Crim. P. 16(d), (e).

Teresi next alleges that it was erroneous to deny him the opportunity, upon cross-examination of "the government witnesses," to discover the current addresses of these witnesses. The United States Attorney asserted in the court of appeals, however, that this information was provided to petitioner. The court of appeals concluded (Pet. App. A, p. 5; 493 F. 2d at 309) that even assuming that the information was not provided, the foreclosure of this inquiry on cross-examination, although erroneous, *Smith* v. *Illinois,* 390 U.S. 129, was harmless. In *Smith,* the "only real question at the trial" was the relative credibility of the defendant and the prosecution witness whose address was not disclosed, *Smith, supra,* 390 U.S. at 130.

3. In rejecting petitioner Teresi's contention that the district court erroneously denied his motion for a new trial, the court of appeals correctly ruled (Pet. App. A, p. 6; 493 F. 2d at 310):

> The decision whether or not to conduct an evidentiary hearing to consider a motion for a new trial is a matter of discretion. *United States* v. *Clay*, 476 F. 2d 1211, 1216 (9th Cir. 1973). Moreover, for a new trial motion to be granted, the movant must show that the newly discovered evidence is not merely cumulative and would "probably produce an acquittal." *Id.* at 1215. Teresi's "newly discovered evidence" was a possibility that two witnesses, in exchange for their testimony, had been promised a dismissal of criminal charges against them. The testimony of these two witnesses was not significant as to appellant Teresi. Given the presence of other testimony sufficiently establishing the existence of the conspiracy, and Teresi's participation in it, one cannot say that the use of the "newly discovered evidence" to attempt to impeach the credibility of these witnesses would, even if the impeachment were successful, "probably produce an acquittal." Appellant's motion for a new trial was properly denied. Cf. *Remmer* v. *United States*, 347 U.S. 227 * * * (1954). [Footnote omitted.]

4. Finally, with respect to petitioner Teresi's contention that the court erred in failing to give the requested jury instruction as to his co-defendant's mental competence, the court below said (Pet. App. A, pp. 6–7; 493 F. 2d at 310):

> [Petitioner] requested a jury instruction to the effect that, if the jury should find his co-defendant Thompson not guilty by reason of insanity, then Teresi, could not be considered a member of the conspiracy until it was shown that Teresi had conspired with one who was mentally competent. Since Thompson was found guilty, the refusal to give this instruction, even

if assumed to be erroneous, was harmless. *Kotteakos* v. *United States,* 328 U.S. 750, 764–765 * * * (1946); *Sang Soon Sur* v. *United States,* 167 F. 2d 431, 433 (9th Cir. 1948).

Petitioner Teresi also contends that the court erred in denying his requested instruction that the object smuggled as a result of this conspiracy must have been proved to be marijuana. The crime of conspiracy, however, is complete upon the agreement to violate the law, as implemented by one or more overt acts (however innocent in themselves they may be), and is not at all dependent upon the ultimate success or failure of the planned scheme. *United States* v. *Rabinowich,* 238 U.S. 78, 86–88; *Toliver* v. *United States,* 224 F. 2d 742, 744 (C.A. 9). Thus, whether or not marijuana was in fact obtained is irrelevant.

Petitioner Teresi also contends that he was entitled to a jury instruction which would indicate that 18 U.S.C. 371 was a lesser included offense of 21 U.S.C. 176a (conspiracy to smuggle marijuana). But since both these statutes might be applied to the same criminal conduct, the particular statute (21 U.S.C. 176a) prevails over the general one. *Conerly* v. *United States,* 350 F. 2d 679, 681–682 (C.A. 9), certiorari denied, 382 U.S. 1018; *Enzor* v. *United States,* 262 F. 2d 172, 174 (C.A. 5), certiorari denied, 359 U.S. 953.

Petitioner Teresi's final argument relates to the denial of his requested entrapment instruction. Since Teresi did not admit the acts constituting the crime charged, however, the defense of entrapment was not available to him. *United States* v. *Hendricks,* 456 F. 2d 167, 169 (C.A.).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974